STATE OF MICHIGAN

COURT OF APPEALS

JAMES DAYSON,

Plaintiff-Appellant,

v

SUSAN MEINBERG,

Defendant-Appellee.

UNPUBLISHED
July 22, 2014

No. 315508
Wayne Circuit Court
LC No. 12-012760-NM

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7) and (C)(8). On appeal, plaintiff challenges the trial court's finding that his legal malpractice claim was barred by the statute of limitations. Plaintiff argues that his complaint should be considered timely because his constitutional right to access the courts was violated. Plaintiff also contends that the court erred in concluding that he failed to state a claim for intentional infliction of emotional distress (IIED). We affirm.

This case arises from defendant's representation of plaintiff during a criminal appeal. In the criminal case, defendant was convicted of two counts of first-degree home invasion, two counts of breaking and entering a building, two counts of breaking and entering a motor vehicle, unlawful driving away of an automobile, and two counts of assault and battery. Plaintiff appealed to this Court, and we affirmed his convictions and sentences. In his appeal, plaintiff was represented by defendant. Defendant's representation of plaintiff ended September 21, 2010. In 2012, plaintiff, who was in prison, initiated an action against defendant alleging legal malpractice, wanton misconduct, and IIED. Plaintiff submitted his complaint to the prison mail on September 14, 2012; the complaint was filed with the trial court on September 26, 2012. Defendant was mailed the complaint via regular mail on January 2, 2013, and defendant immediately filed a motion for summary disposition. The trial court granted defendant's motion for summary disposition and dismissed all three counts, finding that plaintiff's claim was barred by the statute of limitations.

This Court reviews de novo an order granting or denying summary disposition. *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). When reviewing a motion for summary disposition made pursuant to MCR 2.116(C)(7), alleging that a claim is barred by the statute of limitations, "[t]he Court must consider affidavits, pleadings, depositions, admissions,

and any other documentary evidence submitted by the parties, to determine whether a genuine issue of material fact exists." *Id.* The contents of the complaint will be accepted as true unless specifically contradicted by other documentary evidence submitted by the parties. *Id.*; *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the pleadings alone." *Nuculovic*, 287 Mich App at 61. A motion should be granted under MCR 2.116(C)(8) "only when the plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Clohset v No Name Corp*, 302 Mich App 550, 558; 840 NW2d 375 (2013) (internal quotation marks omitted).

This Court reviews de novo questions of constitutional law. *Lima Twp v Bateson*, 302 Mich App 483, 503; 838 NW2d 898 (2013). We review an unpreserved claim of constitutional error for outcome-determinative plain error. *Id.* "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011) (citation omitted).

Defendant's motion for summary disposition was properly granted for several reasons. First, plaintiff's complaint was not filed with the court within the statute of limitations. An action for legal malpractice must be brought within two years from the date the claim accrued or arose, or within six months from the date "the plaintiff discovers or should have discovered the existence of the claim, whichever is later." MCL 600.5805(6); MCL 600.5838(2); *Wright v Rinaldo*, 279 Mich App 526, 529; 761 NW2d 114 (2008). An action for legal malpractice accrues on the date the attorney "discontinues serving the plaintiff in a professional capacity as to the matters out of which the claim for malpractice arose." *Wright*, 279 Mich App at 528-529, quoting MCL 600.5838(1) (internal quotation marks omitted). Plaintiff's complaint asserts that defendant was his attorney from May 2009 to September 21, 2010. Indeed, plaintiff's criminal appeal ended on September 21, 2010, when this Court issued its opinion affirming plaintiff's convictions and sentences. See *People v Dayson*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2010 (Docket No. 291702). However, plaintiff's complaint was not filed until September 26, 2012, more than two years after September 21, 2010. Thus, looking at the filing date for the complaint alone, plaintiff's claim for legal malpractice is barred by the statute of limitations.

Second, the filing of a complaint alone does not toll the statute of limitations. See MCL 600.5856; *Gladych v New Family Homes, Inc*, 468 Mich 594, 605; 664 NW2d 705 (2003). After filing the complaint, one must look at MCL 600.5856, which indicates what is required to toll the statute of limitations. *Gladych*, 468 Mich at 605. MCL 600.5856 provides that the statute of limitations is tolled "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules," or when "jurisdiction over the defendant is otherwise acquired." A plaintiff has 91 days from the date the complaint is filed to serve the summons and a copy of the complaint on the defendant; the summons expires after 91 days. See MCR 2.102(D). Plaintiff did not actually send the summons and complaint to defendant until January 2, 2013. Thus, the statute of limitations continued to run until at least January 2, 2013, when plaintiff sent the summons and complaint to defendant. See MCL 600.5856; *Gladych*, 468 Mich at 605.

Third, the complaint and summons were not properly served. MCR 2.105(A) provides that process may be served by personally delivering the summons and a copy of the complaint to the defendant, or by sending the summons and a copy of the complaint by registered or certified mail, return receipt requested. Plaintiff sent the summons and a copy of the complaint to defendant by regular mail on January 2, 2013. Thus, service was not proper.[1]

Plaintiff asserts that his constitutional right to access the courts was violated. Plaintiff argues that his complaint should be considered timely because he placed it in the prison legal mail before the statute of limitations expired. Plaintiff contends that if he were not incarcerated and reliant on prison officials to send his mail, he could have filed his complaint before the deadline. Plaintiff did not raise this issue in the trial court, so it is reviewed for outcome-determinative plain error. See *Lima Twp*, 302 Mich App at 503.

The constitutional right of prisoners to access the courts is well-established. *Lewis v Casey*, 518 US 343, 349-355; 116 S Ct 2174; 135 L Ed 2d 606 (1996); *Bounds v Smith*, 430 US 817, 821-832; 97 S Ct 1491; 52 L Ed 2d 72 (1977). This right ensures prisoners "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Lewis*, 518 US at 351, quoting *Bounds*, 430 US at 825 (internal quotation marks omitted). An inmate's right to access the courts includes: 1) the right to file appeals and habeas corpus petitions without payment of docket fees if the inmate is unable to afford them; 2) the right to receive copies of trial records even if the inmate is unable to pay for them; 3) the right to the appointment of counsel in appeals from their convictions; 4) the right to assistance from other inmates with habeas corpus applications and civil rights actions; and 5) the right to state-funded paper and pen, notarial services, and stamps. *Bounds*, 430 US at 821-825. Thus, the right to access the courts does not include the right to have any complaints or other documents immediately filed upon placing them in the mail. See *Lewis*, 518 US at 349-355; *Bounds*, 430 US at 821-825.

Furthermore, the constitutional right of access to the courts requires that prisoners have "the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis*, 518 US at 356. The injury requirement for a claim that one's constitutional right to access the courts has been violated "is not satisfied by just any type of frustrated legal claim." *Id.* at 354. Rather, the right covers "attempts by inmates to pursue direct appeals from the convictions for which they were incarcerated" and is extended "only slightly, to civil rights actions – i.e., actions under 42 USC 1983 to vindicate basic constitutional rights." *Id.* (internal citations and quotation marks omitted). In the instant case, plaintiff was not pursuing a

[1] Plaintiff asserts that he requested the trial court to forward his summons and complaint to an officer for service of process. This is not a proper method of service. MCR 2.105. Moreover, plaintiff cites no authority to show that the court clerk was required to forward his documents for service or that the clerk has the authority to do so. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 298 Mich App 192, 199; 826 NW2d 197 (2012).

direct appeal from his convictions or filing a petition for habeas corpus.[2] He was not seeking to vindicate his basic constitutional rights by filing an action under 42 USC 1983. Rather, he wanted to file a complaint against his former attorney for legal malpractice, wanton misconduct, and IIED seeking monetary damages. An inmate's constitutional right to access the courts does not apply to such an action. See *Lewis*, 518 US at 354-356; *Bounds*, 430 US at 821-825.

Plaintiff further contends that the "prison mailbox rule" should be extended to civil cases, like the one he filed here. Plaintiff is referring to MCR 7.205(A)(3),[3] which provides, in part:

> If an application for leave to appeal in a criminal case is received by the court after the expiration of the periods set forth above or the period set forth in MCR 7.205(F), and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed.

However, MCR 7.205(A)(3) reflects the concept that a prisoner's right to access the courts applies only when the prisoner is appealing his convictions, filing a petition for habeas corpus, or asserting a violation of his constitutional rights in an action under 42 USC 1983. See *Lewis*, 518 US at 354-356; *Bounds*, 430 US at 821-825. As discussed above, this constitutional right has not been extended to prisoners filing civil complaints and seeking monetary damages. See *id*. In addition, this Court does not have the authority to amend the Michigan Court Rules; the Michigan Constitution gives the Supreme Court exclusive rulemaking authority in matters of court practice and procedure. Const 1963, art 6, § 5.

Plaintiff also asserts that his constitutional access to the courts was violated because the trial court clerk refused to file legal papers in plaintiff's case file. Primarily, plaintiff refers to correspondence he sent to the trial judge and to the court clerk. The correspondence sent by plaintiff was not a proper filing and, thus, need not be included in the register of actions, as plaintiff contends. MCR 1.109; MCR 2.107(G); MCR 8.119(D). Further, "[i]t is the responsibility of the party who presented the materials to confirm that they have been filed with the clerk." MCR 2.107(G). Moreover, we note that plaintiff's correspondence was kept in the lower court record, even though it was not included in the register of actions as a filing. Thus, these documents were available to this Court during the review of this appeal. For these reasons,

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[2] In his brief on appeal, plaintiff asks this Court to "grant a writ of habeas corpus to release Appellant from unconstitutional restraint" from his underlying criminal case. However, plaintiff did not raise this issue in the trial court and plaintiff makes no further argument in support of that contention. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008) (citation omitted).

[3] MCR 7.205 was amended by Administrative Order No. 2014-20, __ Mich __ (2014), but the amendment was not effective until May 7, 2014, and the section discussed here was not changed.

we do not find any outcome-determinative plain error in regard to plaintiff's constitutional right to access the court. See *Lima Twp*, 302 Mich App at 503.

Finally, plaintiff's claims for wanton misconduct and IIED were also barred by the statute of limitations. "It is well accepted that in ruling on a statute of limitations defense the court may look behind the technical label that plaintiff attaches to a cause of action to the substance of the claim asserted." *Local 1064, RWDSU AFL-CIO v Ernest & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995). Although plaintiff's claims are labeled wanton misconduct and IIED, they are both based on defendant's legal representation of plaintiff in his criminal appeal before this Court. Plaintiff's claim for wanton misconduct incorporates his allegations of legal malpractice and then asserts that defendant failed "to use and exercise reasonable skill, care, discretion and judgment" in her representation of plaintiff in his criminal appeal. "[W]here a client characterizes a claim against an attorney as a negligence claim and the duty element of the negligence claim is supplied by the existence of an attorney-client relationship, the tort claim is one for malpractice and malpractice only." *Brownell v Garber*, 199 Mich App 519, 532; 503 NW2d 81 (1993); *Barnard v Dilley*, 134 Mich App 375, 378-379; 350 NW2d 887 (1984) (internal citations omitted). Plaintiff's IIED claim also sounded in legal malpractice; it is based on defendant's alleged failure to properly represent him. Thus, this claim is also barred by the statute of limitations and it is unnecessary to determine if plaintiff failed to state a claim for IIED. See *Brownell*, 199 Mich App at 532; *Barnard*, 134 Mich App at 378-379.

Affirmed.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood